PUBLIC VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AT&T CORP.
One AT&T Way
Bedminster, NJ 07921
(202) 457-3090

Complainant,

v. **File No. EB-16-MD-001**

GREAT LAKES COMMUNICATION CORP.
1501 35th Avenue, W
Spencer, IA 51301
(712) 580-4700

Defendant.

GREAT LAKES COMMUNICATION CORP.'S MOTION TO EXCLUDE REPORT OF AT&T'S EXPERT WITNESS, DAVID I. TOOF, PH.D.

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PUBLIC VERSION

Great Lakes Communication Corp. ("GLCC" or "Great Lakes"), by counsel and pursuant to 47 C.F.R. § 1.727, hereby moves to exclude substantial portions of the expert report of AT&T's putative expert witness, David I. Toof, Ph.D., which is attached to AT&T's Formal Complaint as Exhibit 13.

I. SUMMARY

Through this Motion, Great Lakes asks the Commission to exclude all portions of the expert report of David I. Toof, AT&T Formal Complaint Exhibit 13, which purports to express conclusions regarding telecommunications networks, law, and policy. Toof is not qualified as an expert on telecommunications networks, and has no experience, other than testifying as a paid AT&T witness, regarding telecommunications issues. Great Lakes further asks the Commission to exclude all portions of Toof's report related to damages because the issue of damages has been bifurcated at the request of AT&T and is therefore irrelevant. Insofar as Toof's report is not excluded in its entirety, Great Lakes requests that portions of his analysis be excluded because it (a) offers legal conclusions that are contrary to existing FCC precedent, and/or (b) the evidence and conclusions reached by Toof are inherently unreliable.

II. INTRODUCTION

Dr. David Toof is an expert in "quantitative methodologies." His experience related to the telecommunications industry is limited exclusively to serving as an expert witness for AT&T. Indeed, he has no experience or training whatsoever outside of litigation that qualifies him to address the merits of this case.

In addition, even if he were a telecommunications expert – which he certainly is not – AT&T should not be permitted to offer as evidence any of the various legal conclusions that Toof reaches. Not only did Toof directly contradict many of his own opinions during his

deposition, other opinions are squarely at odds with Federal Communications Commission ("FCC") precedent relating to competitive local exchange carriers ("CLECs") like Great Lakes.

Great Lakes does not dispute Dr. Toof is generally qualified through education and training to testify on damages-related issues, but Dr. Toof's testimony on damages is nevertheless unsound and subject to exclusion because he fails to apply any expertise in his analysis. His opinions on damages are either based on erroneous facts or simply unsupported by the applicable legal standard.

Thus, and as explained in detail below, Great Lakes moves the Bureau to exclude significant portions of Dr. Toof's expert report.

III. APPLICABLE LEGAL STANDARD

Great Lakes acknowledges that the Commission has explicitly adopted the Federal Rules of Evidence only in matters involving a formal hearing. *See In re Comcast Cable Commc'ns, LLC,* 26 FCC Rcd. 3726, 3730 (2011) ("Only 'formal hearings' before the Commission, such as occur before an Administrative Law Judge, are governed by the Federal Rules of Evidence, and even then only if the ends of justice would be served by their application."); 47 C.F.R. § 1.351. Moreover, courts have often recognized that an administrative agency is not required to strictly apply Federal Rule of Evidence 702 or the Supreme Court's *Daubert* precedent in its administrative proceedings.

That being said, administrative agencies are still required to assess the admissibility and reliability of evidence submitted by a party. As the Seventh Circuit has observed, "because [administrative agencies] believe that they have the skill needed to handle evidence that might mislead a jury . . . [t]hey have a corresponding obligation to *use* that skill when evaluating technical evidence." *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001)

(emphasis in original). Several courts have agreed that, while *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993), does not expressly apply, its "spirit" is applicable to administrative agencies because those agencies must refrain from basing their decisions on unreliable evidence. *See WorldNet Telecomms., Inc. v. Telecomms. Regulatory Bd. of Puerto Rico*, 707 F. Supp. 2d 163, 214 (D.P.R. 2009)*; McElmurray v. U.S. Dep't of Agriculture,* 535 F. Supp. 2d 1318, 1325 (S.D. Ga. 2008); *Lobsters, Inc. v. Evans,* 346 F. Supp. 2d 340, 344-45 (D. Mass. 2004). For these reasons, the Bureau should apply *Daubert's* spirit in evaluating this Motion.

The spirit of *Daubert* flows from the requirement of Rule of Evidence 702, which provides that expert evidence is admissible only if the proffered expert possesses sufficient "knowledge, skill, experience, training, or education" about the subject matter of his testimony. Fed. R. Evid. 702. Federal Rule of Evidence 702 provides that expert testimony should be admitted if (a) it will help the trier of fact understand the evidence or determine a fact in issue, (b) it is based on sufficient facts, (c) it "is the product of reliable principles and methods," and (d) "the expert has reliably applied the principles and methods to the facts of the case." *Id.*; *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In *Daubert* the Supreme Court explained that a trial court must perform a "gatekeeper" function pursuant to Rule 702 to ensure that only relevant and reliable expert testimony is admitted. The Eighth Circuit Court of Appeals has explained the *Daubert* analysis as follows:

> First, the trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." ... The [*Daubert*] Court cautioned that the trial court must focus "on [the] principles and methodology, not on the conclusions that they generate." ... Second, the court must ensure that the proposed expert testimony is relevant and will serve to aid the trier of fact.... Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact.... The Court, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), clarified that the district court's gatekeeper function applies

> to all expert testimony, not just testimony based in science. *Id*. at 147, 119 S.Ct. 1167.

Kudabeck v. Kroger Co., 338 F.3d 856, 860 (8th Cir. 2003) (internal citations to *Daubert* omitted). The "gatekeeper" role requires the trial court to "separate [ ] expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge." *Glastetter v. Novartis Pharm. Corp*., 252 F.3d 986, 989 (8th Cir. 2001).

IV. DR. TOOF IS NOT QUALIFIED TO REACH THE MERITS-RELATED DETERMINATIONS SET FORTH IN HIS EXPERT REPORT

A. Dr. Toof Is Not Qualified As a Telecommunications Expert

Great Lakes challenges Dr. Toof's qualifications as an expert in telecommunications, and specifically his qualification to reach conclusions regarding whether, under federal telecommunications law and policy, GLCC is entitled to payment from AT&T for GLCC's tariffed interstate switched access services. Dr. Toof describes himself as an expert in the "[a]pplication of *quantitative* methodologies to issues of regulation," including the "development and implementation of litigation related *damage assessments* and management information systems." *See* Expert Report of David I. Toof, Ph.D. ("Toof Report"), Ex. DIT-1, at 1 (AT&T Ex. 13) (emphasis added). Dr. Toof is not qualified based on knowledge, skill, experience, training, or education to testify about the merits-related conclusions he has proffered in his expert report.

Dr. Toof's formal education is in an area he described as "operations research," which he defines as "a multifaceted discipline combining mathematics, economics, finance, management and marketing." *See* David Israel Toof, Ph.D. Deposition Transcript ("Toof Tr."), 159:20 – 24 (attached to GLCC's Answering Submission as **Exhibit 13**). His professional experience has focused on "*quantitative"* microeconomics. *Id.* at 160:4 – 23 (emphasis added). Dr. Toof was

previously employed at Ernst & Young and predecessor firms. *Id.* at 160:24 – 161: 24. His role at Ernst & Young was to head the "Washington, D.C. litigation support practice," which "coordinate[d] with Washington, D.C lawyers for all litigation support, accounting, economic, finance." *Id.* at 163:16 – 164:4. He also gained experience regarding energy issues by working on projects related to the Federal Energy Office. *Id.* at 169:10 – 170:8. However, before becoming a professional witness, his professional experience related to the telecommunications industry and the Federal Communications Commission was only on the "peripher[y]." *Id.* at 170:9 – 171:5. He would occasionally perform "second partner review" on documents prepared by other offices, but "**basically, [his] responsibility did not include telecommunications**" while he was at Ernst & Young. *Id.* at 171:1 – 23 (emphasis added).

In 1996, Dr. Toof left Ernst & Young to start his own consulting practice. On his first telecommunications-related project after leaving Ernst & Young, he worked with AT&T's legal counsel from Sidley Austin, Mr. Bendernagel, on a case for AT&T. *Id.* at 171:24 – 172:25. He performed economic analysis and damages assessment in that case. *Id.* at 173:1 – 8. It was as a result of Mr. Bendernagal's hiring of Dr. Toof to examine a litigation issue for AT&T that Dr. Toof was able to starting doing "more telecom work at that point." *Id.* at 171:24 – 172:25. Indeed, other than a case for which he was jointly retained to represent AT&T and Verizon, Dr. Toof ***has never been retained to provide expert testimony on behalf of any carrier other than AT&T.*** *Id.* at 180:12 – 181:7.

He has never performed any work for a Competitive Local Exchange Carrier (like GLCC) or a conference call provider. *Id.* at 181:8 – 13. He has never been employed by a telecommunications regulator or advised a telecommunications regulator regarding any policy-making issues. *Id.* at 181:14 – 20. In addition, he has never drafted a telecommunications tariff

or received any specialized training in reviewing, interpreting or applying a telecommunications tariff or telecommunications regulatory orders. *Id.* at 181:21 – 182:21. As a result, Dr. Toof does not even know, among other threshold issues surrounding the FCC's intercarrier compensation rules, whether the FCC has established the same policies for the amounts to be paid between carriers for the exchange of local traffic as it has established for the exchange of interstate traffic. *Id*. at 184:3 – 185:4.[1]

With regard to the specific services offered by GLCC, such as tandem switch termination, Dr. Toof provided testimony about what he "assume[d]" the service entailed, but repeatedly stressed that he is "not a telecommunications engineer," a shorthand way of saying that he has no familiarity with how telecommunications networks actually function. *Id.* at 186:11 – 22. Indeed, his assumption about the functionalities provided by GLCC to AT&T at issue in this case is derived from "taking a look at tariffs," some of which, he noted, include pictures. *Id.* at 186:23 – 187:4.

Nor is Dr. Toof an expert in telecommunications policy. For example, he has never studied and does not know whether the FCC rules permits Incumbent LECs and Competitive LECs to provide switched access service or end user customer services pursuant to contract or tariff, or whether the right to provide services pursuant to contract is reserved for CLECs. *Id.* at 189:17 – 191:21. In short, Dr. Toof is attempting to dress up AT&T's legal arguments as though

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[1] This fact is particularly significant, because Dr. Toof seeks to opine that $0.0007 is an appropriate rate for GLCC's interstate access services, but that rate has only been applied by the FCC for the exchange of local traffic delivered to Internet Service Providers, and never for the exchange of long-distance traffic. *See* Rebuttal Expert Report of Michael Starkey, 30-31 ("Starkey Rebuttal") (excerpts attached to GLCC's Answering Submission as Exhibit 14) (citing *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *Order on Remand and Report and Order*, FCC 01-131, released April 27, 2001 ("*ISP Remand Order"*)); *see also Global NAPs, Inc. v. Verizon New England Inc.,* 603 F.3d 71, 80-83 (1st Cir. 2010) (concluding that, despite a change in view as to the jurisdictional basis for its decision, the FCC's rules establishing the $0.0007 rate continued to apply only to local ISP-bound traffic).

they were the opinion of a telecommunications expert, but he does not have the necessary training or experience to reach those issues.

As the Fifth Circuit has noted, the "professional expert" is a commonplace phenomenon in modern litigation. *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1234 (5th Cir. 1986). While the fact that a person spends substantially all of his/her time consulting with attorneys and testifying in trials is not a per se disqualification, it is similarly not an automatic qualification guaranteeing admission of the expert's opinions. Experts whose "opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge's decision that he is an 'expert[,]'" and the trial judge must decide whether the signs of competence and of the contribution of the proposed expert will aid in clearly presenting the dispute. *Id.* Because Dr. Toof has no specialized education, knowledge, experience, or training regarding (1) the appropriate interpretation and application of a federal telecommunications tariff or (2) federal telecommunications policy, he should not be qualified as an expert in this case except with regard to the quantitative calculation of damages. The remainder of his opinions should be excluded.

B. Dr. Toof Cannot Offer Legal Opinions on Telecommunications Law

Even if Dr. Toof were qualified as an expert regarding the interpretation and application of federal telecommunication tariffs or telecommunications policy, many of his merits-related conclusions would nevertheless be improper and inadmissible. Much of Dr. Toof's anticipated testimony is a legal brief. He spends a significant amount of his report summarizing (often incorrectly) various FCC and state level proceedings, and describing his (or counsel's) view of the law, without applying any real expertise.

But, as courts have previously concluded, "[w]hile expert testimony may be permissible to describe a complicated agency process, such testimony should not prescribe legal standards to apply to the facts of the case." *CFM Communications, LLC v. Mitts Telecasting Co.,* 424 F. Supp. 2d 1229, 1233 (E.D. Cal. 2005) (citing *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 508-09 (2d Cir. 1977)). Indeed, "[t]he meaning of federal regulations is a question of law, not a question of fact." *Id.* (citing *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 900 (7th Cir. 1994)). Expert testimony has been excluded when it amounts to "review[ing] FCC rulings and regulations." *TC Systems, Inc. v. Town of Colonie,* 213 F. Supp. 2d 171, 181-82 (N.D.N.Y. 2002). Dr. Toof should not be allowed to speculate about how the FCC would "likely apply statutory and case law precedent" to the facts of this case. *CFM Commc'ns*, 424 F.Supp.2d at 1236-37.

1. Dr. Toof's Brief Regarding FCC and Iowa Utilities Board Rulings and Regulations are Biased

Paragraphs 28 – 77 of Dr. Toof's report provide a biased overview of various rulings and regulations issued by the FCC and Iowa Utilities Board. Much of the discussion is in the form of a legal brief, an apparent effort by Dr. Toof to instruct on his view of legal precedent. This type of disguised expert testimony is not needed by this agency.

2. Dr. Toof's Conclusion that GLCC's Rates are Not Just and Reasonable Could Only be Determined by the FCC

Dr. Toof concludes that GLCC's switched access rates are not just and reasonable. AT&T Ex. 13, Toof Report ¶¶ 86-91. This conclusion flows from his opinion that GLCC should have provided AT&T with a direct interconnection and is thus a repetition of AT&T's formal complaint. The rates in GLCC's tariff are "deemed lawful," yet Dr. Toof fails to acknowledge or address the application of 47 U.S.C. § 204(a)(3). Therefore, his conclusions are unreliable

because the rates in the tariff are reasonable, as a matter of law, unless the Commission enters an order to the contrary. There is no reason to allow AT&T's expert to usurp the role and independence of this Commission by offering up AT&T's arguments disguised as an expert opinion.

3. Dr. Toof's Conclusion that [BEGIN CONFIDENTIAL] [redacted] Charge [END CONFIDENTIAL] is at Odds with FCC Precedent

AT&T has submitted Dr. Toof's expert report in its entirety, even though portions of it relate to arguments that AT&T has not raised in its Formal Complaint or the accompanying legal analysis. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** As AT&T did not raise this argument for the Bureau's consideration, Dr. Toof's opinion on this issue should be excluded.

If these portions of Dr. Toof's report are not excluded because of their irrelevance to this proceeding, they should nevertheless be excluded because Dr. Toof has no expertise on which to offer this opinion, and perhaps because of that, it ignores controlling FCC precedent. At deposition, Dr. Toof acknowledged that he did not know whether the FCC had ever required a CLEC to assess such a SLC/EUCL charge on end users and, in fact, he understood that "the F.C.C. does not directly get involved in the relationships between a CLEC and its end users." **Exhibit 13**, Toof Tr. 199:5-25. Dr. Toof also acknowledged that he failed to review and

consider the FCC's policy on this issue, including a 2013 FCC Order explaining its policy as follows:

> [T]he Commission's rules set forth precisely how ILECs must recover from their end-user subscribers and interexchange carriers the costs assigned to the interstate jurisdiction. In particular, **the rules require ILECs to recover a portion of the local loop through a flat-rate SLC assessed on the end-user customer.** Consistent with these rules, revenues derived from the SLC must be reported as interstate revenue on the FCC Form 499 for USF contribution purposes.
>
> **There is no corresponding requirement for CLECs.** We agree with Petitioners that neither the Commission's formal separation process that governs how ILECs assign their costs to intrastate and interstate jurisdictions, nor the access charge rules that govern how ILECs recover those costs from their customers apply to CLECs. Although CLECs must report their end-user interstate revenues on the FCC Forms 499, **no Commission rule or order requires them to identify and recover from their end-user customers a SLC or equivalent charge for the non-traffic-sensitive costs of providing interstate or interstate exchange access service.**

In re Universal Service Contribution Methodology, 28 FCC Rcd. 16037, ¶¶ 11-12 Declaratory Ruling and Order (Nov. 25, 2013) (emphasis added) (footnotes omitted).

In sum, Dr. Toof's conclusion that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is directly contradicted by the FCC's clearly stated policy, which does not require CLECs to assess a SLC on their end user customers. There is no basis for Dr. Toof's conclusion, he never had any expertise to offer it, and he should be precluded from opining that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

4. Dr. Toof's Conclusion that [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] Ignores the Tariff

[BEGIN CONFIDENTIAL] **[END CONFIDENTIAL]** This portion of Dr. Toof's expert report relates to arguments that AT&T has not raised in its Formal Complaint or the accompanying legal analysis. As AT&T did not raise this argument for the Bureau's consideration, Dr. Toof's opinion on this issue should be excluded.

If these portions of Dr. Toof's report are not excluded because of their irrelevance to this proceeding, they should nevertheless be excluded because the reasoning for Dr. Toof's analysis relies upon a single source – his non-expert "common sense" – and ignores the controlling document – GLCC's Tariff No. 2 ("Tariff"). GLCC's FCC Tariff No. 2 clearly resolves this issue; it provides as follows:

> End User Designated Premises (EDP): A location designated by the End User for the purposes of connecting to the Company's services. In some circumstances, **the EDP may be located in Company's central office**.

Tariff, Original Page No. 8 (emphasis added). GLCC's Tariff was filed on 15 days' notice and received "deemed lawful" protection pursuant to 47 U.S.C. § 204(a)(3). Section 204(a)(3) provides that any "charge, classification, regulation, or practice" in GLCC's tariff "shall be deemed lawful." *Id.* Section 204(a)(3), combined with the filed tariff doctrine, prohibits AT&T from modifying or deviating from the terms of GLCC's Tariff. For this reason, AT&T's expert cannot substitute the definitions in CenturyLink's tariff, *see* AT&T Ex. 13, Toof Report ¶ 103,

for those actually contained in GLCC's tariff.[2] Nor can Dr. Toof substitute his non-expert "common sense," *id.* at ¶ 104, or an order of the Iowa Utilities Board (which has no bearing on federal law), in place of GLCC's deemed lawful tariff. Fed. R. Evid. 702.

As Dr. Toof testified at his deposition, the basis for this opinion is just "common sense," not a real understanding of what federal law would require for an end user's premises:

> Q. . . . Paragraph 104, Page 38 of your report, you state that as a matter of common sense, a premises of an end user would necessarily require an area that is separate from the carrier's facility. And this is here – your discussion about end user premises. Other than common sense, are you relying on anything in concluding that the Federal Communications Commission would require an end user to have an area that is separate from the carrier's facility?
>
> A. Again, this is -- the whole issue of end user's premises is one that's come up in many of these traffic-pumping litigations –
>
> Q. Um-hum.
>
> A. -- and what constitutes an end user's premises has -- has been listed. So there's a lot of – there's a body of findings here. But in my mind, common sense is that an end user's premises is his premises; it's not your premises –
>
> Q. Um-hum.
>
> A. -- whether you put it in by tariff or not that says, Well, this is going to be your premises. But it's – it's just basically my opinion --
>
> Q. And --
>
> A. – there's no F.C.C. -- I have no F.C.C. cite here for this. That's why it says "common sense."

Exhibit 13, Toof Tr. 266:4 – 269:5. Dr. Toof should be precluded from testifying about his lay, "common sense" understanding of what constitutes an end user's premises. His lay opinion is just that, and his opinion is directly contradicted by GLCC's "deemed lawful" Tariff, which expressly allows end users to designate a GLCC facility for the provision of services.

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[2] Dr. Toof conceded he did not consider how the "deemed lawful" status of GLCC's tariff impacted his view of the applicable definitions, because he failed to consider the fact that the protection extends to the terms and conditions of the tariff but, rather, focused solely on the rates being lawful. **Exhibit 13**, Toof Tr. 251:6-17.

5. Dr. Toof's Conclusion that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] is Not Material to Interstate Traffic

[BEGIN CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** This portion of Dr. Toof's expert report relates to arguments that AT&T has not raised in its Formal Complaint or the accompanying legal analysis. As AT&T did not raise this argument for the Bureau's consideration, Dr. Toof's opinion on this issue should be excluded.

If these portions of Dr. Toof's report are not excluded because of their irrelevance to this proceeding, they should nevertheless be excluded because it is not material. His conclusion relies upon a March 2012 order of the Iowa Utilities Board, in which the Board concluded that Great Lakes would not be certificated by the state (at that time) to provide local exchange services in Spencer, Iowa. GLCC does not dispute the fact that, until sometime in or about September 2012, its conferencing customers were located in Spencer, Iowa. However, that fact is not material, as a matter of law, to the question of whether GLCC is entitled to collect tariffed *interstate access charges*.

The geographic areas referred to as Spencer, Lake Park, and Milford are known in the telecommunications industry as "exchanges." Exchanges are defined as, *inter alia*:

> A geographic area established by a common communications carrier for the administration and pricing of telecommunications services in a specific area that usually includes a city, town or village. An exchange consists of one or more central offices and their associated facilities. An exchange is not the same as a LATA. A LATA consists of several adjacent exchanges.

Newton's Telecom Dictionary, 451, 25th Edition (June 2009) (attached to GLCC's Answering Submission as **Exhibit 31**). As Dr. Toof testified, exchanges are established pursuant to state law. **Exhibit 13**, Toof Tr. 233:9-14.

A LATA, or Local Access and Transport Area, is a geographically larger area than an exchange. *Id.* at 233:22 – 2. A LATA is defined, in pertinent part, as:

> One of 196 local geographical areas in the US within which a local telephone company may offer telecommunications services – local or long distance. At one stage, AT&T was expressly prohibited from offering intraLATA calls by the terms of the Divestiture. But it is now allowed to offer intraLATA phone calls. Other competitors, such as MCI and Sprint, though rules vary by state, have always been allowed to offer intraLATA phone calls and do so in many states. LATAs serve basically two purposes. First, they provide a method for delineating the area within which the Bell Operating Companies may offer service. Second, they provided a basis for determining how the assets of the former Bell System were to be divided between the Bell Operating Companies and AT&T.

Exhibit 31, Newton's Telecom Dictionary, 653-54, 25th Edition (June 2009).

Consistent with the notion that an exchange is relevant to the provision of local services, and that the LATA is relevant to the provision of "local or *long distance service*," the FCC and AT&T have previously agreed that a LEC can provide service throughout a LATA (at a minimum). *See, e.g., AT&T Corp. v. Alpine Commc'ns, LLC,* 27 FCC Rcd. 11511, ¶¶ 31 – 34 (FCC Sept. 12, 2012) (some of the defendant carrier's tariffs restricted their ability to provide exchange access services to "within the LATA" in which they served end users, while other defendant carrier's tariffs did not; for those LECs whose tariffs restricted the service, the FCC found the carrier did not appropriately bill for transport services provided outside of the LATA).

Dr. Toof's conclusion that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** flips the federal-state dichotomy on its head. *Federal* law looks to LATAs, while *state* law considers exchanges. Dr.

Toof has offered no support for his position that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and GLCC's tariff certainly does not impose such a restriction. Indeed, Dr. Toof conceded at deposition that there may well be scenarios in which a local exchange carrier could be entitled to collect at least some of its tariffed access charges for providing service in a territory in which it did not hold a state certificate, but he had never looked at that possibility. **Exhibit 13**, Toof Tr. 240:22 – 242:19.

In addition, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** ignores the fundamental purpose of state certification. Iowa's certification requirements, which were originally established to allow the state to control the level of competition in particular exchanges, makes clear that a certificate of public convenience and necessity is issued to "define the service territory in which land-line *local* telephone service will be provided." Iowa Code § 476.29(4) (emphasis added). Thus, Dr. Toof has shown nothing in either state or federal law that links a state-issued certificate of public convenience and necessity to a carrier's ability to collect tariffed access charges. As a result, Dr. Toof should not be permitted to invent such a link as an excuse for AT&T's refusal to pay GLCC's tariffed interstate access charges.

V. BECAUSE OF AT&T'S DECISION TO BIFURCATE THE CASE, DR. TOOF'S DAMAGES ASSESSMENT IS IRRELEVANT TO THIS STAGE OF THE PROCEEDING AND SHOULD BE EXCLUDED

AT&T has submitted Dr. Toof's expert report in its entirety, even though substantial portions of it relate entirely to Dr. Toof's analysis of AT&T's alleged damages. AT&T elected to bifurcate the damages phase of this proceeding, however, meaning that the Bureau does not

currently have damages issues under consideration. *See* AT&T Formal Complaint, ¶ 9. For this reason, pages 42-50 should be excluded in their entirety.

VI. MUCH OF DR. TOOF'S ASSESSMENT OF DAMAGES IS SERIOUSLY FLAWED

If Dr. Toof's discussion of damages is not excluded in its entirety because of its irrelevance to this phase of the proceedings, it should nevertheless be excluded as unreliable. Dr. Toof's report purports to rebut GLCC's claims for damages, as well as the damages that AT&T seeks through its counterclaims. Dr. Toof's analysis is not an admissible damages analysis, and does not rebut GLCC's damages calculations.

In light of AT&T's refusal to pay the vast majority of GLCC's access charges, AT&T has virtually no damages to which it could be entitled. Moreover, since the Court dismissed several of AT&T's counterclaims, Dr. Toof instead spent much of his time trying to reframe AT&T's dismissed counterclaims as offsets or credits to GLCC's damages.

Furthermore, Dr. Toof decides, based on a fundamental misunderstanding of the evidence and no independent analysis, that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

As explained more fully below, much of Dr. Toof's damages assessment is unreliable and should be deemed inadmissible for all purposes.

A. Dr. Toof's Conclusions Regarding GLCC's Alternative Claim for *Quantum Meruit* Damages Are Fundamentally Unreliable

1. Dr. Toof's Written Opinion That the Claim is "Likely Preempted by the Filed Tariff Doctrine" Should Be Excluded

Paragraph 123 of Dr. Toof's report should be stricken, and he should be precluded from opining that GLCC's alternative claim for recovery pursuant to *quantum meruit* or implied contract is "preempted by the Filed Tariff Doctrine."

As an initial matter, whether or not the filed tariff doctrine precludes GLCC's alternative claim for *quantum meruit* is purely a question of law, and thus not an appropriate subject of expert testimony. Expert testimony is admissible only insofar as it will assist the trier of fact in understanding the evidence or determining a disputed issue of fact. Fed. R. Evid. 702. On the other hand, "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *United States v. Brodie*, 858 F.2d 492, 497 (9th Cir. 1988); *see also Peterson v. City of Plymouth*, 60 F.3d 469 (8th Cir. 1995) (trial court committed reversible error by admitting expert testimony that "was not a fact-based opinion, but a statement of legal conclusion.... The legal conclusions were for the court to make."); *Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003) ("[E]xpert testimony on legal matters is not admissible.... Matters of law are for the trial judge, and it is the judge's job to instruct the jury on them."). Indeed, courts have consistently concluded that experts are not permitted to testify about the meaning and requirements of the filed tariff doctrine or whether a particular claim is preempted by federal telecommunications law. *Sancom, Inc. v. Qwest Commnc'ns Corp.*, 683 F.Supp.2d. 1043, 1060 (D.S.D. 2010) (holding that the application and requirements of the filed tariff doctrine "are matters for the judge to consider at summary judgment and, if necessary, to instruct the jury on"); *TC Systems,* 213 F. Supp.2d at 181-82 (expert was prevented from offering a legal conclusion about whether claims were preempted). For this reason, Dr. Toof should not be permitted to offer "expert" testimony about the impact of the filed tariff doctrine on GLCC's ability to maintain its alternative state law claims for recovery.

Dr. Toof's testimony should also be excluded for other reasons. Chiefly, Dr. Toof – who "only peripherally" worked on matters related to the FCC and who, prior to becoming a professional expert witness, did not have responsibilities that "include[d] telecommunications,"

Exhibit 13, Toof Tr. at 170:9 – 171:5 – is not an expert in determining whether the filed tariff doctrine prohibits a CLEC from seeking recovery for services pursuant to alternative state law claims. Indeed, the only support Dr. Toof offers for his conclusion is a single citation to *AT&T Corp. v. All Am. Tel. Co.,* 28 FCC Rcd. 3477, ¶ 37 (Mar. 25, 2013). *See* AT&T Ex. 13, Toof Report at 43 & n.89. However, *All American* merely states that a carrier cannot collect for tariffed access services until it files a valid interstate tariff or enters into contracts with IXCs for the access services. It does not address, in any manner, whether the filed tariff doctrine preempts state law claims of implied contracts. This is a legal issue which should not be decided by AT&T's paid spokesperson.

Dr. Toof's opinion should also be excluded because it is inconsistent with the deposition testimony he provided, rendering his opinion unreliable and unhelpful to the trier of fact. During his deposition, Dr. Toof conceded that GLCC's alternative claim may not actually be preempted:

> Q. Dr. Toof, we're on Page 43 of your report, I believe --
>
> A. Yes, sir.
>
> Q. -- and we're going to talk a bit about Great Lakes' Third Damage Claim that you have discussed there. You say that this third damage claim, which is for quantum meruit or an implied contract, right, so it's a scenario in which the tariff doesn't apply -- you say that this claim is likely preempted by the Filed Tariff Doctrine; is that correct?
>
> A. Yes.
>
> Q. What's the basis for that conclusion?
>
> A. It's my opinion that if – if there's no -- if a tariff is rejected as being unjust and unreasonable or not – not applicable, then the Filed Tire -- the Filed Tariff Doctrine would preclude recoveries at the same level of cost.
>
> Q. Okay. Does it preclude recoveries at the -- at other levels of cost?
>
> A. Well, it would certainly preclude recovery at greater levels of cost. I don't think there's any way you can get more than your filed tariff --
>
> Q. Okay.
>
> A. -- ***but it's conceivable there's scenarios, such as a quantum meruit argument, where you could recover something from that cost.*** It depends upon the jurisdiction, the law, Federal law, F.C.C. law, state law. It's -- it's a very -- I -- I do a lot of damages work, and it's a very – liability and -- and -- and -- and

> damage -- and the underlying damage theory is very complicated at these issues with a mix between – especially here, you have a mix between F.C.C. regulation and -- and state law. ***But it's conceivable. It's conceivable that there is a -- that there is a smaller claim that could be asserted.***

Exhibit 13, Toof Tr. 114:23 – 116:17 (emphasis added). Thus, contrary to Dr. Toof's written opinion that GLCC's claim is "meritless" and "preempted" by the filed tariff doctrine, he has acknowledged that it is entirely conceivable that this claim could entitle GLCC to recovery if GLCC's Tariff does not apply to the traffic at issue. For this additional reason, Dr. Toof's opinion should be excluded.

2. Dr. Toof's Testimony About Whether AT&T "Agreed" To Purchase Service from Great Lakes Is Not Admissible

In paragraph 124, Dr. Toof concludes that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Under Iowa law, "a plaintiff claiming the existence of an implied contract must show the following: (1) plaintiff performed under circumstances reasonably indicating the performance was for the benefit of defendant and not another person; (2) plaintiff performed under circumstances reasonably indicating payment was expected; and (3) the services provided by the plaintiff were beneficial to the defendant." *Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F.Supp.2d 850, 910 (S.D. Iowa 2005) (citing *Scott v. Grinnell Mut. Reinsurance Co*., 653 N.W.2d 556, 562 (Iowa 2002)); see also *Iowa Waste Systems, Inc. v. Buchanan County*, 617 N.W.2d 23, 29-30 (Iowa App. Ct. 2000).

Dr. Toof offers only a single basis for his conclusion that **[BEGIN CONFIDENTIAL]**

[redacted]

[END CONFIDENTIAL] Despite making this assertion, Dr. Toof fails to offer any support for his understanding of federal law; during his deposition, he could not offer a specific point of reference and admitted he does not know whether the prohibition applies to all types of traffic that AT&T might send to GLCC. For example, he did not know or consider whether the prohibition against blocking might apply to the "retail" traffic that AT&T carries, while not applying to traffic that AT&T voluntarily delivers on behalf of other carriers, so-called "wholesale traffic." He testified as follows:

> Q. Do you have an understanding of whether that prohibition of blocking traffic applies equally to AT&T customers' traffic as compared to the traffic that AT&T carries on behalf of other telecommunications companies?
>
> MR. HUNSEDER: I object to the form: calls for a legal conclusion.
>
> THE WITNESS: I -- I don't know --
>
> BY MR. CARTER:
>
> Q. Okay.
>
> A. -- I do not know.
>
> My -- my -- my recollection is it's all traffic carried by AT&T, but I – I just don't know. That is – that's a – that's a -- really, that's a – that's a legal issue that can be – that's clearly resolved.

Exhibit 13, Toof Tr. 119:2 – 17.

Noticeably, Dr. Toof failed to even consider the distinction between retail and wholesale traffic in reaching his opinion, and could not testify whether the prohibition applied to wholesale traffic even though GLCC's expert (in his affirmative report) expressly addressed this distinction in conjunction with his opinions regarding GLCC's *quantum meruit* claim. *See* Expert Report of Michael Starkey, 15 – 17 (attached to GLCC's Answering Submission as **Exhibit 10**)

(describing how, *inter alia*, AT&T's participation in the wholesale marketplace, in which AT&T actively solicits traffic from other carriers, is a good example of how AT&T receives value from GLCC's access services).

In short, Dr. Toof's testimony regarding whether AT&T and GLCC agreed to an implied contract flows from a legal premise that he has failed to show is sound. Absent that legal premise, Dr. Toof fails to connect the facts of the case to his conclusion. Therefore, Dr. Toof's testimony about his understanding of whether AT&T "agreed" to pay for AT&T's services will not aid the fact finder. For these reasons, Dr. Toof's testimony should be excluded. *See, e.g., Pioneer Hi-Bred Int'l, Inc. v. Ottawa Plant Food, Inc.,* 219 F.R.D. 135, 140 (N.D. Iowa 2003) (excluding expert testimony because the expert's reasoning was invalid and could not be properly applied to the facts because it was based on a flawed legal conclusion).

3. Dr. Toof's Opinion That [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] Unreliable and Not Based on Evidence

If the elements of an implied contract are established, the appropriate measure of damages is the "the reasonable value of the services provided and the market value of the materials furnished." *Iowa Waste*, 617 N.W.2d at 30 (*citing Paffhausen v. Balano*, 708 A.2d 269, 271 (Me. 1998)). Dr. Toof asserts that a rate of $0.0007 per minute "would be the maximum rate" that would be appropriate if GLCC is entitled to collect pursuant to implied contract. AT&T Ex. 13, Toof Report at ¶¶ 128 & 129. This testimony should be excluded because the manner in which Dr. Toof arrived at this conclusion is unreliable.

By way of background, GLCC's expert explains the significance of this rate:

> [T]he only real significance of this rate can be tied to a dated FCC order that used this level of compensation for local traffic bound for Internet Service Providers ("ISPs"). Since then it has gained some popularity for local traffic between carriers who generally believe they will transmit

> roughly the same amount of traffic to another carrier as they likewise receive from that carrier (i.e., where traffic is in balance). And, because it is so low, it is often a rate advocated by IXCs, like AT&T, who would prefer to pay less for switched access services (though, as discussed above, all such attempts have, to date, been rejected by the FCC).

Starkey Rebuttal at 30 (emphasis in original to draw the distinction between the exchange of local traffic and the exchange of long distance access traffic, which are governed by entirely different regulatory regimes); *see also In re Connect America Fund*, 26 FCC Rcd. 17663, 17887, ¶ 692 ("We will not adopt a benchmarking rate of $0.0007 in instances when the definition [of access stimulation] is met, as is suggested by a few parties. The $0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely.") (identifying AT&T as one of the parties that had proposed the $0.0007 rate rejected by the FCC). As Dr. Toof conceded at deposition, he has no knowledge of any CLEC charging $0.0007 for interstate access rates pursuant to either tariff or contract. **Exhibit 13**, Toof Tr. at 129:3 – 15.

Rather, Dr. Toof reached the conclusion that $0.0007 per minute was a "maximum" market rate for GLCC's provision of interstate access traffic because he understood that to be the rate Great Lakes was assessing for its intrastate access charges. *Id.* at 47:25 – 51:9; 129:16 – 130:3. Dr. Toof is simply mistaken in his belief that GLCC is charging $0.0007 for intrastate access. Due to the IUB's decision to suspend GLCC's tariff pending the completion of other proceedings, no intrastate access charges have been assessed by GLCC for quite some time, and $0.0007 has never been GLCC's intrastate access rate. This fact was readily available to AT&T vis-à-vis GLCC's access bills to AT&T, but it appears Dr. Toof neglected to review those access bills. AT&T Ex. 13, Toof Report at Ex. DIT-10.

Second, Dr. Toof did not investigate or analyze whether, in fact, the $0.0007 rate proposed by GLCC in the IUB proceeding reflected a "market rate" for interstate switched access services.

For example, he appears to have assumed, without undertaking any investigation, that the rate submitted by GLCC was a "cost base[d]" rate. **Exhibit 13**, Toof Tr. at 49:14 – 50:5; 130:9 – 21. However, Dr. Toof testified he had no knowledge about how Iowa intrastate access rates are actually established, *id.* at 192:10-193:23, but he was aware that CLECs do not generally set their rates based on the cost of providing service, *id.* at 194:15 – 20. Because his conclusion that GLCC's rates should be capped at $0.0007 was premised on the notion that it reflected a cost-based rate, Dr. Toof was simply unable to say whether he would have reached the same conclusion if, in fact, GLCC's intrastate access rate was not a "cost base[d]" rate. *Id.* at 50:6 – 9.

In reality, as GLCC's CEO Josh Nelson explained at his deposition, the proposed rate of $0.0007 is anything but a cost-based rate:

> Q. Okay. And are you aware of the rate that is being charged under that Tariff for Intrastate Access Service?
> MR. BOWSER: Objection. Lacks foundation.
> A. I know the rate in the Tariff.
> Q. In the Tariff, right.
> A. Yes.
> Q. What is that rate?
> A. .0007.
> Q. So that's seven-hundredths of a penny, is that right?
> A. .0007
> Q. Okay. Do you know how Great Lakes came to have that rate in its Tariff?
> A. Yes.
> Q. How is that?
> A. We formed that rate because we were in litigation with three IXCs, and the way the Utility Board does their intrastate, you have to get everybody's approval or go through a lengthy court process to do it.
> Less than one percent of our traffic is intrastate, so it's an analysis if it's worth the legal battle to do it or not.
> Q. Okay. And so did Great Lakes propose the .0007 rate in order to sort of end the debate and get the legal dispute behind it?
> A. Yes.

Deposition of Joshua D. Nelson at 38:7 – 39:13 (attached to GLCC's Answering Submission as **Exhibit 12**).

Thus, not only did Dr. Toof fail to describe how an intrastate access rate reflected a market rate for interstate access services, the entire basis for his conclusion is fundamentally at odds with the facts – Great Lakes only suggested that rate because it carried so little intrastate access traffic. For this reason, Dr. Toof should be precluded from testifying that $0.0007 represents the maximum market rate for GLCC's interstate switched access services and from offering any calculations that rely on this rate. *See, e.g., Cole v. Homier Distributing Co., Inc.,* 599 F.3d 856, 865 (8th Cir. 2010) ("where, as here, the expert's analysis is unsupported by the record, exclusion of that analysis is proper, as it can offer no assistance to the jury"); *Craftsman Limousine, Inc. v. Ford Motor Co.,* 363 F.3d 761, 777 (8th Cir. 2004) (an expert's analysis that failed to "incorporate all aspects of the economic reality" should not have been admitted) (citations omitted).

4. Dr. Toof Should Not Be Permitted to Testify About [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL]

[BEGIN CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** Dr. Toof's analysis fails to take into consideration the legal effect of GLCC's deemed lawful tariff status, 47 U.S.C. § 204(a)(3). Therefore, Dr. Toof's analysis is unreliable and should be excluded. Moreover, Dr. Toof testifies that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** This argument is flawed because Dr. Toof does not offer proof about what, if anything, was actually *paid* to INS by AT&T. Moreover, if AT&T received and paid for tariffed services from

INS, it is AT&T's responsibility – not GLCC's – to pay for those services. For this reason, Dr. Toof's legal conclusions should be excluded.

B. Dr. Toof's Conclusions Regarding GLCC's Alternative Claim for Unjust Enrichment

1. Dr. Toof's Written Opinion That the Claim is "Likely Preempted by the Filed Tariff Doctrine" Should Be Excluded

For the same reasons set forth in Section VI.A.1. above, Dr. Toof should be precluded from opining that GLCC's alternative claim for recovery based on AT&T's unjust enrichment is preempted by the filed tariff doctrine. The flaws with Dr. Toof's opinion regarding GLCC's *quantum meruit* claim apply equally to the unjust enrichment claim.

Dr. Toof's testimony should also be precluded for an additional reason: **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Thus, Dr. Toof has conceded that whether or not GLCC is entitled to recovery through an unjust enrichment claim is an issue that he is not qualified to address.

2. Dr. Toof's Anticipated Testimony that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] Should Be Barred

According to his report, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Dr. Toof's position is contrary to the prevailing view on restitution damages.

The Restatement (Third) of Restitution and Unjust Enrichment discusses the proper calculation of funds to be disgorged in conjunction with an unjust enrichment claim. The Restatement provides that the "value for restitution purposes of benefits obtained by the misconduct of the defendant, culpable or otherwise, is not less than their market value." Restatement (Third) of Restitution and Unjust Enrichment § 51(2). It also goes on to discuss the measure of recovery that would be appropriate if AT&T is found to have been a "conscious wrongdoer," which is defined as a defendant "who is enriched by misconduct and (a) who acts with knowledge of the underlying wrong to the claimant, or (b) despite a known risk that the conduct in question violates the rights of the claimant." *Id.* at § 51(3). Under this scenario, section 51(4) makes clear that the measure of damages for a "conscious wrongdoer" is the "net profit attributable to the underlying wrong" unless the "market value" of the benefit obtained by the defendant's misconduct would produce "greater *liability.*" *Id* § 51(4) (emphasis added); *see also id.* at Illustration 7 (establishing that a carrier's tariffed rate is the market rate and thus the *minimum* amount of damages to which the carrier would be entitled when a party wrongfully seeks to deprive the carrier of its tariffed charges) (emphasis added); *Guyana Tel. & Tel. Co. v. Melbourne Int'l Commc'ns, Ltd.*, 329 F.3d 1241 (11th Cir. 2003) (cited as support for Illustration 7).

Based upon the foregoing, Dr. Toof's opinion that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is simply wrong as a matter of law. To the contrary, it constitutes the

minimum amount of damages to which GLCC would be entitled if GLCC establishes that AT&T is a conscious wrongdoer.[3]

3. Dr. Toof's Opinion that [BEGIN CONFIDENTIAL] [redacted] [END CONFIDENTIAL] Unreliable and Not Based on Evidence

For the same reasons set forth in Section IV.A.3, Dr. Toof should be precluded from testifying that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** The measure of damages for an unjust enrichment claim is the "value of what was inequitably retained" *by the defendant*. *Iowa Waste Systems*, 617 N.W.2d at 29. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** He testified that $0.0007 reflected "the market value of the terminating service." **Exhibit 13**, Toof Tr. at 147:13 – 148:4. He further testified that he did not differentiate between the measure of damages for *quantum meruit* and unjust enrichment; the method of arriving at damages, in his mistaken view, was "the same for both" and "two sides of the same coin."

> Q. Okay. And I believe you testified that one of the ways in which you can look at an unjust enrichment claim is to consider the value received by the party that did not pay for the services. Is that accurate?
>
> A. Again, you keep using the word "value," and I never used the word "value."
>
> MR. CARTER: Could -- could you –

[3] In any event, allowing Dr. Toof to testify in the manner set forth in his report would invade the province of the Court to determine the applicable law. *See, e.g., Pioneer Hi-Bred Int'l,* 219 F.R.D. at 140 (excluding expert testimony because the expert's reasoning was invalid and could not be properly applied to the facts because it was based on a flawed legal conclusion). For this reason, Dr. Toof should not be permitted to opine that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

THE WITNESS: I -- I --

MR. CARTER: -- read back his previous response?

THE WITNESS: -- if I did, it was -- it was inappropriate. I don't use the term "value." It's – it's the -- the – the cost that was avoided and -- and the value that that cost that was avoided conferred on them. So I -- I don't want to -- again, it's – it's -- I want to be clear that it's my opinion that an unjust enrichment claim -- the measure of the damages would have been what AT&T would have paid Great Lakes for this service in -- in -- in -- in a -- in a transaction. And I think it's the same as the quantum meruit; it's the .0007.

Q. Okay. And how did you conclude that AT&T would have paid Great Lakes .0007 for the traffic if there was no tariff that was applicable?

A. I don't think AT&T would have paid. We're now talking about what the legal liability is in terms of it. And lacking the tariff claim and the alternative contract claim, it's my position that a -- that the market price -- the quantum meruit market price is the .0007, and I think that's the reasonable measure to use.

Q. Okay. So it's your testimony that the market price is the measure of damages for both the implied contract and for the unjust enrichment claim?

A. For the quantum -- well, if you're talking implied contract is quantum meruit, yes, .0007 would be the same for both, yes.

Q. And it's your testimony as an expert witness that the measure of damages, then -- the methodology used to establish damages under Great Lakes' Claims 3 and 4 are the same measure of damages?

A. Yeah, the -- the -- the measure of quantum meruit -- in my experience, quantum meruit and unjust enrichment are basically two sides of the same -- with some provisos as to whether applicable or not, but are two sides of the same coin, whether the argument is in law or in equity.

Exhibit 13, Toof Tr. at 151:12 – 153:19.

The fundamental distinction between these two theories of recovery has been well documented. The distinction is discussed in a Florida Bar Journal article cited by the Iowa Court of Appeals in *Iowa Waste*, 617 N.W.2d at 29:

> There is a crucial theoretical difference between the measure of recovery under unjust enrichment and that under quantum meruit. Unjust enrichment focuses on the "benefit conferred" upon the recipient rather than the reasonable value of services by the claimant as determined from the market. That is, one looks through the eyes of the recipient to determine whether what was done constituted a benefit at all and, if so, what was the value received. In some cases, there may

> be no difference in the dollar amount as viewed from either side, but in others the difference may be great.

H. Hugh McConnell, "Distinguishing Quantum Meruit and Unjust Enrichment in the Construction Setting," *The Florida Bar Journal*, 71 FLA. BAR J. 88 (March 1, 1997). Dr. Toof's failure to distinguish between the two distinct theories of recovery renders his conclusions about the appropriate rates of recovery so unreliable as to be inadmissible.

4. Dr. Toof Should Not Be Allowed to Offer Opinions Regarding AT&T's Costs, Other Than Amounts Paid to Iowa Network Services

Finally, with regard to GLCC's unjust enrichment claim, GLCC seeks an order precluding Dr. Toof from offering opinions regarding any costs that AT&T may have incurred in completing calls to GLCC's exchange, with the exception of the amounts actually paid by AT&T to Iowa Network Services for the provision of Centralized Equal Access.

With the exception of the issues discussed above, Dr. Toof did not take issue with the calculations performed by GLCC's damages expert, Warren Fischer, in arriving at value of the benefit received by AT&T. Dr. Toof did not review Mr. Fisher's calculations (Toof Tr. at 153:20 – 24), did not ask AT&T for information that would have allowed him to analyze AT&T's revenues for delivering calls to Great Lakes (*id.* at 154:1 – 6), and did not ask AT&T for any information that would have allowed him to evaluate AT&T's costs in delivering the traffic at issue, with the exception of the costs paid to Iowa Network Services for its provision of centralized equal access to AT&T (*id.* at 154:7-12), before AT&T stopped paying those charges too. In short, Dr. Toof did not undertake any analysis to demonstrate the costs that should be subtracted from any unjust enrichment to AT&T. As a result, Dr. Toof should be barred from offering any opinions relative to the costs (other than the INS costs that he analyzed) that AT&T may have incurred in carrying its wholesale and retail traffic for termination to GLCC.

C. AT&T's Second Counterclaim

In paragraph 137 of his report, Dr. Toof purports to set forth calculations for Count II of AT&T's counterclaims. However, Dr. Toof's purported damages assessment for this claim should be excluded.

Dr. Toof's purported calculation of damages for Counterclaim II is based entirely on his flawed conclusion that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is not based on reliable evidence, and is fundamentally flawed. As such, he should be prohibited from introducing a damages calculation based on this rate.

Moreover, Dr. Toof's analysis is flawed because it does not, in fact, present a calculation for AT&T's damages at all. Rather, it reflects a calculation of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Thus, Dr. Toof's calculation does not reflect AT&T's *damages*. After all, Dr. Toof admits in paragraph 136 of his report that, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** As Dr. Toof conceded during his deposition, he has not even calculated the actual amount of damages that he contends AT&T would be entitled to under this claim. **Exhibit 13**, Toof Tr. 51:10 – 53:11. Thus, because Dr. Toof failed to present an actual calculation of damages, it will be confusing for the jury to allow him to testify about his alternative calculation of *GLCC's* damages as if it were an actual calculation of AT&T's damages.

D. AT&T's Third Counterclaim

In paragraphs 138 – 141 of his report, Dr. Toof purports to discuss damages related to AT&T's Third Counterclaim, which alleges that GLCC acted unlawfully by not providing a direct interconnection to AT&T for the exchange of its long-distance traffic. As with his discussion regarding AT&T's Second Counterclaim, Dr. Toof should be prohibited from offering conclusions in this regard for several independent reasons.

The actual calculation of the purported harm to AT&T is unreliable. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** However, as Dr. Toof testified at deposition, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

Q. [redacted]

[redacted] **[END HIGHLY CONFIDENTIAL]**

As Dr. Toof testified, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Thus, oddly, the only expertise Dr. Toof appears to have applied to this analysis was an apparent "expertise" in producing *less specific* calculations than those he purports to have relied upon in forming his conclusions.

Because Dr. Toof has failed to exercise reasonable diligence in reviewing the data used for his calculation, and because he is simply accepting an unverified conclusion reached by AT&T, his testimony on this calculation should be excluded.[4] *See, e.g., U.S. Salt, Inc. v. Broken*

[4] Dr. Toof acknowledges that, if this claim were to move forward, he assumes there would need to be an AT&T witness sponsoring the cost estimates he relied upon. **Exhibit 13**, Toof Tr. 66:24 – 67:4.

Arrow, Inc., 563 F.3d 687, 691 (8th Cir. 2009) (expert testimony was properly excluded where expert relied entirely on analysis performed by party's president and expert failed to verify data or conduct independent investigation); *Lyman v. St. Jude Medical S.C., Inc.*, 580 F. Supp. 2d 719, 726-27 (E.D. Wis. 2008) (damages expert's testimony was excluded because the expert "should have independently verified the reliability of the data before opining" on an issue of damages).

Equally problematic for Dr. Toof's conclusion is the fundamental disconnect between the cost contained in INS's tariff and the costs that AT&T would have incurred in establishing and maintaining a direct interconnection with GLCC. The lack of interrelationship makes it fundamentally unreasonable for Dr. Toof to have based his calculation of AT&T's savings as a percentage of the rates charged by INS. Dr. Toof admitted as much during his deposition. **Exhibit 13**, Toof Tr., 65:3 – 67:8 ("by INS changing its rate would – would not change the cost that AT&T would incur of a direct connection. . . . One does not drive the other -- ").

Finally, even if Dr. Toof was permitted to testify about this issue in general, he should be prohibited from testifying about the portion of his analysis that relates to amounts billed by AT&T, but not paid by INS. Due to AT&T's decision to withhold payment from INS of INS's access charges, just as it has done to GLCC, AT&T has not incurred the vast majority of the purported damages about which Dr. Toof intends to testify. His testimony should thus be limited to amounts actually paid by AT&T to INS.

E. AT&T's Fourth Counterclaim

In Paragraphs 142 – 146 of his report, Dr. Toof argues that the FCC's decision in *AT&T Corp. v. Alpine Communications, LLC,* 27 FCC Rcd. 11511 (Sept. 12, 2012), *recon. denied*, 27 FCC Rcd. 16606 (2012), "is directly applicable" to determining whether GLCC properly charged

AT&T for mileage pursuant to the Tariff. This portion of Dr. Toof's expert report relates to arguments that AT&T has not raised in its Formal Complaint or the accompanying legal analysis. As AT&T did not raise this argument for the Bureau's consideration, Dr. Toof's opinion on this issue should be excluded.

CONCLUSION

For the foregoing reasons, GLCC respectfully requests that the Bureau strike the following paragraphs of Dr. Toof's Report, as well as any paragraphs summarizing the conclusions reached in these paragraphs (*e.g.,* Paragraphs 9-26 & 84), and exclude testimony and opinions from Dr. Toof regarding the matters contained therein: Paragraphs 28 – 77, 86 – 91, 93 – 95, 97 – 118, 123 – 125, 127 –134, and 137 – 141.

DATED: September 15, 2016

Respectfully submitted,

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PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2016, I caused a copy of the foregoing Motion to Exclude Report of AT&T's Expert Witness, David I. Toof, Ph.D, and all accompanying materials, to be served as indicated in brackets below to the following:

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[Public Version via ECFS and Original via Federal Express; the Confidential Version and Highly Confidential Version via Federal Express]

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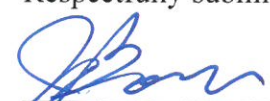
Respectfully submitted,



Joseph P. Bowser